IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1515

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY FOR PETITIONER THE LONG ISLAND RAIL ROAD COMPANY

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The Aberdeen Opposition [1] to the LIRR Petition misconceives the issues and misstates the facts in this case. The issues are two: (1) Is the LIRR entitled to collect

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[1] The Brief in Opposition for Respondents Aberdeen & Rockfish Railroad Company, *et al.*, dated May 24, 1978, is herein called the "Aberdeen Opposition." The Brief of Intervenors-Respondents Southeastern Association of Regulatory Utility Commissioners and Southern Governors' Conference in Opposition to Petition for Writ of Certiorari, dated May 24, 1978, is herein called "SEARUC Opposition." References to appendices in the form "App. ——" are to the appendices accompanying LIRR's Petition, filed April 24, 1978.

and use the proceeds of its interim terminal surcharge until the validity of the permanent terminal surcharge is finally adjudicated? and (2) Is the LIRR entitled to collect its permanent terminal surcharge under the Railroad Retirement Amendments of 1973 ("RR Amendments")?

With respect to the first issue—the LIRR's right to use the proceeds of its interim terminal surcharge—there is a direct conflict between the decision of the three-judge court and that of the Court of Appeals. The three-judge court had held that the LIRR could use the proceeds of its interim terminal surcharge until there was a final determination on the LIRR's permanent rate increase.[2] The Court of Appeals ordered the LIRR "to restore . . . the interim terminal surcharge" but deprived the LIRR of the use of the surcharge revenues by imposing a trust fund on them.[3] Such a conflict renders this case worthy of this Court's review.[4] Indeed, this Court has already taken extraordinary action to preserve this issue for review by granting, in part, the LIRR's Application for Stay.[5] Given the language of the statute,[6] its legislative history[7] and the final decision of the three-judge court,[8]

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[2] *Long Island RR.* v. *United States*, 388 F. Supp. 943 (E.D.N.Y. 1974) (App. D).

[3] 565 F.2d at 335 (App. A 16a).

[4] The Aberdeen Respondents' attempt to distinguish the two decisions (Aberdeen Opposition at 15 n.9) is incomprehensible. Since the Court of Appeals directed the LIRR "to restore the *interim* rates pending a determination of the final rates" and explicitly imposed the trust fund on "the 12.5 percent *interim* terminal surcharge" (565 F.2d at 335 (App. A 15a-16a) (emphasis added)), the Court of Appeals had to be acting under and governed by Section 15a(4)(b), not under Section 15a(4)(c), as the Aberdeen Respondents suggest.

[5] Order of this Court, dated March 6, 1978 (No. A-688) (App. E 1e).

[6] 49 U.S.C.A. § 15a(6)(b) (Supp. 1977) (App. G).

[7] LIRR Petition at 10 n. 15.

[8] *Long Island RR.* v. *United States*, 388 F. Supp. 943 (E.D.N.Y. 1974) (App. D).

the LIRR suggested that it would be appropriate for this Court summarily to reverse the Court of Appeals on this issue. The Federal Respondents agreed and join the LIRR in requesting summary reversal on this issue.[9] Neither Opposition offers any reason—except an irrelevant "divisions" argument[10]—to the contrary.

With respect to the second issue—the validity of the ICC's approval of the LIRR's permanent terminal surcharge—the Aberdeen Respondents argue that the ICC did not adequately explain why the LIRR could impose a permanent terminal surcharge to recoup its increased railroad retirement taxes. The Aberdeen Respondents can make this argument only by ignoring, as the Court of Appeals ignored, the explicit findings made by the ICC.

The Aberdeen Respondents identify only two respects in which the ICC allegedly failed to provide a "reasoned explanation": They claim the ICC failed to explain (1) why "a terminal surcharge could be imposed in the absence of special service," and (2) why the LIRR's increased railroad retirement taxes could not be recouped through passenger fare increases.[11]

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[9] Memorandum for Federal Respondents, filed June 8, 1978, at 4-5; *see* Memorandum for the United States and the Interstate Commerce Commission, filed in this Court on March 1, 1978, at p. 2 n.2, p. 3 n.6.

[10] The Aberdeen Respondents' "divisions" argument is plainly irrelevant to the trust fund issue. The text and the legislative history of the RR Amendments make it clear that railroads were not to be deprived of the use of interim rates under 49 U.S.C.A. § 15a(6)(b) (Supp. 1977). See LIRR Petition at 10 & n.15. If the interim rates are ultimately found to be too high, refunds are to be paid to shippers, none of whom is a party to this proceeding, not to other railroads. Thus, there is no basis for the Aberdeen Respondents' assertion that the Court of Appeals' trust fund order is necessary to protect the parties to this proceeding. Aberdeen Opposition at 29.

[11] Aberdeen Opposition at 17. The Aberdeen Respondents assert, as did the Court of Appeals, that these alleged failures to provide a "reasoned explanation" are "merely '[i]llustrative of the deficiencies

Contrary to these Respondents' assertions, the ICC did explain its action in each of these respects. The ICC explicitly found that the LIRR was "unique" and would obtain less than five percent of the revenue needed to offset its increased retirement tax obligations by joining in the general freight rate increase allowed other railroads. 350 I.C.C. at 711 (App. B 51b). The ICC also recognized that a general rate increase of more than 37.5% in all line-haul rates would be required if the LIRR were to recoup its increased costs solely from a general rate increase. 350 I.C.C. at 706 (App. B 44b). The ICC was aware that the only other realistic alternative—pooling of revenues from a general surcharge—was acceptable to the LIRR but was opposed by the Aberdeen Respondents. 350 I.C.C. at 676-77, 708 (App. B 6b, 48b). These factors, which were recited by the ICC,[12] unequivocally demonstrate that, if the LIRR is to recover its increased railroad retirement taxes from freight rates, it has to do so through some kind of a surcharge.[13]

On the question whether the LIRR could generate the revenues needed to offset its increased retirement taxes from passenger fares, the Aberdeen Respondents assert: "[T]he Commission made *no* findings that Long Island

in the ICC report'" (Aberdeen Opposition at 17 n.11, *quoting* 565 F.2d at 334 (App. A 12a). In attempting to rely on other alleged but undisclosed deficiencies in the ICC decision, the Aberdeen Respondents seem oblivious to the requirement that courts articulate the basis for upsetting an administrative order.

[12] The Aberdeen Respondents try to distinguish between the "discussion and conclusions" section and other sections of the ICC decision. Aberdeen Opposition at 18-19. There is, of course, no requirement that the ICC set forth its findings or the reasons for its action under any particular headings in its decision.

[13] Although the Aberdeen Respondents try to give the impression that the majority of the country's railroads oppose the LIRR surcharge, the facts plainly show otherwise. Conrail has agreed to the LIRR surcharge, and Conrail-LIRR shipments constitute far more carloads than the Southern-LIRR and Western-LIRR traffic combined.

commuters could not bear the burden of the increase in commuter costs resulting from the retirement tax increase." Aberdeen Opposition at 21 (emphasis in original). The Aberdeen Respondents simply ignore the ICC's explicit findings:

> In many general increase proceedings, we have held that if the passenger service, inevitably and inescapably, could not bear its direct costs or its share of joint or indirect costs, such passenger deficit must be taken into account in adjustment of freight rates and charges. *We reach the same conclusion in regard to the terminal surcharge of the Long Island*, and find that there is nothing unlawful in using it to offset its total increased retirement taxes, including those of employees engaged in commuter and other passenger service. 350 I.C.C. at 715 (App. B 57b) (emphasis added).

It is difficult to imagine how the ICC could have been more explicit in finding that the LIRR's "commuter and other passenger" service "inevitably and inescapably, could not bear its direct costs or its share of joint or indirect costs." And the Federal Respondents agree, arguing that the ICC findings were "easily . . . adequate."[14]

[14] Memorandum of Federal Respondents at 3. The Federal Respondents, while urging summary reversal of the "trust fund" order and agreeing with the LIRR that the Court of Appeals erred on the permanent surcharge, assert that the latter issue does not meet the requirements for plenary review, *id.* at 3, 4. They are, we submit, mistaken. The Court of Appeals decision is in direct conflict with the decision of another federal court; it decided a question of first impression under a federal statute; and it departed from accepted standards of review by ignoring the findings of an administrative agency and substituting its own judgment for that of the agency.

While we agree with the Federal Respondents that the ICC "remains free . . . to reach the same result on remand," Memorandum for Federal Respondents at 3, the administrative process is seriously undermined and regulated enterprises are injured when courts of appeals ignore agency findings and substitute judicial preference for administrative expertise. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, —— U.S. ——, 46 U.S.L.W. 4301, 4310 (U.S. April 3, 1978) (No. 76-419).

Perhaps recognizing that they ought to do more than assert that the ICC did not make findings that it plainly did make,[15] the Aberdeen Respondents offer two "red herrings." First, they attempt to distinguish intercity passenger service from commuter service. Aberdeen Opposition at 22-23. Whatever the validity of this distinction as a general proposition, it has no force here.[16] The increased retirement taxes at issue in this case were imposed on LIRR's "commuter and other passenger service" solely because of the LIRR interstate freight operations. Thus, such added costs of commuter service are inextricably interwoven with the LIRR's freight operations, and are not "distinct" as the Aberdeen Respondents erroneously suggest.

Second, the Aberdeen Respondents argue that the ICC accorded too much deference to LIRR "managerial discretion." Aberdeen Opposition at 20-21. Given its express findings that (1) the LIRR passenger service "inevitably and inescapably" could not bear its joint or indirect costs, (2) the LIRR passenger deficit was over $100 million per year, and (3) the LIRR also conducts its freight

[15] The Aberdeen Respondents also complain that the ICC did not cast its findings in the precise "standards and limitations" language of the statute. Aberdeen Opposition at 17-19. But such specificity was not necessary. See *Minneapolis & St. L. Ry.* v. *United States*, 361 U.S. 173, 193 (1959) ("Again, although the Commission made no specific finding upon that contention it did consider and discuss it, and we think the law required no more.").

[16] The Aberdeen Respondents' acknowledgement that they included the increased railroad retirement taxes attributable to their commuter employees in their general freight rate increase (Aberdeen Opposition at 22 n.15) is inconsistent with their legal position that it is inappropriate for the LIRR to recover such costs through freight rates. Moreover, the inconsistency is not alleviated because such increased retirement taxes were "minor items" for the southern and western railroads. The record shows that items considered "minor" or "small" in relation to the southern railroads ($2.2 million) would pay more than one third of the LIRR's aggregate increase in retirement taxes. See, *e.g.*, 350 I.C.C. at 676-77 (App. B 6b).

operations at a multimillion dollar annual deficit, the ICC was required to allow the LIRR some "managerial discretion" under the RR Amendments.[17] Moreover, the Aberdeen Respondents have precious little basis to complain about the MTA's "managerial discretion" so long as the MTA and the State of New York *subsidize* the LIRR's *freight* operations as they have continued to do even with the terminal surcharge.

Most of the Oppositions are devoted to a lengthy argument based on the law of "divisions" under Section 15(6) of the Interstate Commerce Act, 49 U.S.C.A. § 15(6) (Supp. 1977)—an argument that is irrelevant because it is predicated on a mischaracterization of the Court of Appeals decision. The Court of Apeals did not hold, as the Aberdeen Respondents suggest, that "the Commission had not . . . [made] the findings required by Section 15(6) of the Act." Aberdeen Opposition at 14. In fact, Section 15(6) is nowhere cited in the Court of Appeals decision. Instead, the Court of Appeals held that the LIRR surcharge had the "economic effect" of altering the allocation of total transportation charges, and that the ICC had failed to make findings justifying that effect.[18] This distinction is critical because it determines what issue is presented for review. The issue is not whether the find-

[17] In enacting the RR Amendments Congress rejected a provision that would have made interstate rate increases "concurrently effective on intrastate shipments" (H.R. Rep. No. 93-319, 93d Cong., 1st Sess. 12-14 (1973)) and severely restricted the ICC's ability to overturn decisions of railroad managers and state officials regarding intrastate rates. 49 U.S.C.A. § 15a(6)(d)(C) (Supp. 1977), Pub. L. No. 93-69, § 201(4)(d)(C), 87 Stat. 167 (1973) (App. B).

[18] 565 F.2d at 335 (App. A 14a-15a). Of course, total transportation charges are often comprised of other elements in addition to the line-haul charges and are thus not always split strictly according to divisions. Moreover, both the Aberdeen Respondents and the Court of Appeals seem to suggest that "equal-factor" divisions are universal. They are not. The western railroads, for example, generally get inflated divisions.

ings required by Section 15(6) were made;[19] the issue is what findings under the RR Amendments justify a final rate decision that has the "economic effect" of altering the allocation of total transportation charges, but does not in fact alter the existing divisions of joint rates.[20]

Since the Aberdeen Respondents concede that the ICC had authority to deviate from general rate increases in fulfilling its responsibilities under the RR Amendments,[21] *a fortiori* they are logically forced to concede that the RR Amendments authorize the ICC to allow rates that have the economic effect of altering the existing allocation of total transportation charges. The only question remaining is what findings under the RR Amendments are required to support that result. We submit that the ICC findings that the LIRR needed the revenue and could not generate it from increased passenger fares, together with the find-

[19] The Aberdeen Respondents are wrong in stating that LIRR "suggests—again for the first time—that the Court of Appeals made 'findings on the divisions point' which were somehow sufficient to meet the requirements of Section 15(6)." Aberdeen Opposition at 26. LIRR has consistently contended that the findings required by the RR Amendments to justify the economic effect of the terminal surcharge were made by the ICC, but that those findings are not the same as the findings required by Section 15(6).

[20] All of the Aberdeen Respondents' examples and graphs notwithstanding, they receive just as many dollars for a haul from point A (off the LIRR system) to point B (on the LIRR system) as they would without the terminal surcharge.

[21] Aberdeen Opposition at 26. The Aberdeen Respondents seem to imply without any substantiation that the LIRR terminal surcharge is somehow inconsistent with the "public interest and the mainteance of the lawful rate structure." It is in the public interest to have a rate to LIRR points approximately equal to the rates to surrounding New York points and the terminal surcharge accomplishes that objective. LIRR Petition at 6. It would be inconsistent with the maintenance of a lawful rate structure for the Aberdeen Respondents to share in the LIRR surcharge because their rates would then exceed not only those needed to recoup their own increased railroad retirement taxes but also the maximum rates allowed by the ICC under the RR Amendments.

ing that the needed revenue could not be generated through a general rate increase without a tremendous windfall to other carriers and the refusal of the Aberdeen Respondents to enter into a general pooling arrangement, fully support the result reached by the ICC.[22]

[22] Nowhere in their Opposition do the Aberdeen Respondents deny that the southern railroads are in the inequitable position of asserting that they should have the right to retain a windfall because their share of the general rate increase exceeded their increased retirement taxes while they simultaneously argue that the LIRR should not be permitted to recover more than 5% of its increased railroad taxes.

The Aberdeen Respondents also claim that the LIRR's terminal surcharge imposes a greater burden on longer hauls than on shorter ones, but they fail to acknowledge that it was within their power to agree to a general pooling arrangement which would have avoided this allegedly undesirable feature of the terminal surcharge.

CONCLUSION

For the reasons stated above and in its Petition for Certiorari, the LIRR respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals vacating the ICC approval of the LIRR permanent terminal surcharge. In the alternative, the LIRR asks the Court to issue a Writ of Certiorari and summarily reverse the Court of Appeals' "trust fund" order so that the LIRR may continue to use the proceeds of its interim terminal surcharge until there is a final determination on the LIRR's permanent rate increase under the RR Amendments.

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